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No. 08-

In The
SUPREME COURT OF THE UNITED STATES

Christa Marie Labbe, (Agency No.40-136-414)
Petitioner,

vs.

Michael B. Mukasey, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal courts are permitted to review constitutional challenges to agency action, even those which arise in the context of an agency's exercise of discretion as it is not within an agency's discretion to violate the constitutional rights of a litigant. This court addressed this issue in the context of habeas proceedings in *INS v. St. Cyr*, 121 S.Ct 2271 (2001) finding that federal courts do, in fact, have jurisdiction to consider such constitutional challenges.

The Circuit Court below asserted that it lacked jurisdiction to consider the Petitioner's challenge to the adverse action of the agency because the constitutional challenge was raised as a "bare allegation" and failed to state a colorable constitutional violation.

The question presented is:

Whether the Court of Appeals properly asserted that it lacked jurisdiction to adjudicate the Petitioner's appeal due to her failure to present a constitutional challenge to the decision of the Board of Immigration Appeals which denied the Petitioner's appeal of the entry of an order of removal against the Petitioner, where the Petitioner's notice of appeal raised a constitutional challenge to the defective manner in which the immigration court prepared the subpoena needed to obtain evidence in support of the Petitioner's relief application, where adverse decision of the immigration judge was based substantially upon

its failure to receive the evidence requested by the subpoena and where Petitioner's former counsel was not provided an opportunity to correct the errors in the subpoena so as to obtain the evidence in question prior to the entry of the order of removal.

CORPORATE DISCLOSURE STATEMENT

Christa Marie Labbe is an individual and has no corporate involvement relevant to these proceedings.

TABLE OF CONTENTS

Question Presented ..... i - ii
Corporate Disclosure Statement ii
Table of Contents ..... iii - iv
Table of Authorities ..... iii - iv
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 2
Parties to the Proceeding 3
Statement Of The Case ..... 4 - 9
1. Statutory background ..... 4 - 6
2. Proceedings below ..... 6 - 9
Reasons for granting the Petition ..... 10 - 13
Conclusion ..... 13 - 14
Appendices ..... A-1 - A-12

TABLE OF AUTHORITIES

CASES-

Abdulai v. Ashcroft, 239 F.3d 542 (3rd Cir. 2001) ... 10
Accardi v. Shaughnessy, 347 US 260 (1954) 10
Cruz v. Attorney General, 452 F.3d 240 (3rd Cir. 2006...
..... 5, 12, 13
INS v. St. Cyr, 533 US 289 (2001) ..... i, 13
Khan v. Attorney General, 448 F.3d 226 (3rd Cir. 2006)
..... 13

STATUTES-

28 United States Code Section 1254(1) 1
8 United States Code Section 1182(a)(2)(A)(i)(I) 7

8 United States Code 1252(a)(2)(C) 2, 4, 5
New York Penal Law Section 125.20 7

TABLE OF APPENDICES

Appendix A - Decision of the US Court Of Appeals For the Third Circuit, dated September 21, 2007 .... (A-1 - A-8)
Appendix B - Decision of the US Court of Appeals For The Third Circuit, dated November 20, 2008 .... (A-9 - A-10)
Appendix C - Opinion of The Board Of Immigration Appeals, dated May 13, 2004 ..... (A-11 - A-12)

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Christa Marie Labbe, respectfully petitions for a writ of *certiorari* to review the decision below judgment of the United States Court Of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals below are unreported and are reprinted at *Appendices A*, and *B* herein, dated September 21 and November 20, 2007, respectively, and the opinion of the Board of Immigration Appeals is reprinted at *Appendix C*, dated May 13, 2004 .

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Rehearing was entered on November 20, 2007. Judgment of the Circuit Court on the original appeal was entered on September 21, 2007. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the ***Immigration and Nationality Act***, are found at 8 United States Code, section 1252(a)(2)(C). The relevant statutory provisionis set forth as follows:

C) Orders against criminal aliens

1.Notwithstanding any other provision of law (statutory or nonstatutory) including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182 (a)(2) or 1227 (a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227 (a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227 (a)(2)(A)(i) of this title.

PARTIES TO THE PROCEEDINGS

Petitioner is Christa Marie Labbe a native and citizen of the nation of Haiti. Respondent is Michael B. Mukasey, the Attorney General of the United States.

STATEMENT OF THE CASE

1. Statutory Background-

The US Court of Appeals for the Third Circuit has dismissed the Petition for Review of Petitioner, Christa Labbe, upon its assertion that it lacks jurisdiction to consider her appeal as she is defined as a criminal alien without the right to seek judicial review, pursuant to 8 USC section 1252(a)(2)(C). The Petitioner challenges this determination as she asserts that the Court of Appeals has authority to review asserted constitutional violations such as she asserted in her petition for review. Specifically, the Petitioner asserted that the Respondent erred and otherwise violated her right to due process when the immigration court prepared a defective subpoena in full knowledge that the subpoena was needed for Petitioner to obtain evidence necessary to challenge the Respondent's removal efforts. As was fully knowable to the Respondent in advance, the defective subpoena was rejected and the needed evidence was not tendered. Petitioner's former counsel was not given a sufficient notice of the defect nor an opportunity by the Respondent to correct the defect and seek the needed evidence prior to the time in which the Respondent entered a final order of removal against the Petitioner.

Notwithstanding the fact that the Petitioner's notice of appeal to the Board of Immigration Appeals cites this issue as sufficient grounds for the appeal, the

Court of Appeals asserted that it had no jurisdiction to consider the Petitioner's
petition for review because no constitutional issue challenge was presented in the administrative proceedings. Although the Immigration and Nationality Act, at section1252(a)(2)(C) does not acknowledge a constitutional claim exception, the Court of Appeals noted that its case law, namely, *Cruz v. Attorney General*, 452 F.3d 240 (3rd Cir. 2006), does recognize an exception to the jurisdictional bar where constitutional claims are raised. Nevertheless, the Circuit Court determined that the exception was not applicable in the Petitioner's case because no constitutional challenge was raised by the Petitioner and, to the extent that such a claim was raised, it was deemed to be a "...bare allegation" that failed to assert any prejudice flowed from the asserted constitutional violation. [See, Appendix A at footnote 2]

The Petitioner asserts that the assertion of the Circuit Court that no facts or issues evidencing a constitutional violation or prejudice were raised in the administrative proceedings was error because the notice of appeal filed by Petitioner's former counsel outlined the error of the immigration court and outlined the prejudice to the Petitioner as the result of its preparation of the defective subpoena. On appeal, the Petitioner challenged the denial of the Petitioner's 212(c) relief application by the immigration judge and asserted that she had sought relevant and material evidence regarding her medical condition through subpoena, but that due to defects in the subpoena

prepared by the court, the sought documents were not made available prior to the final hearing before the immigration court. The Petitioner asserted that due to the court's error in preparing the subpoenas and the late notice to Petitioner of the defect, the immigration judge should have continued the case so as to correct the defect in the subpoenas and permit receipt of the requested evidence.

Petitioner asserts that the Board erred in determination regarding the subpoena. The evidence sought by the Petitioner was clearly available and would have been received but for the error of the immigration court in preparing the document, and its finding that the Petitioner had not established that the requested documents were material and or relevant was plain error as the immigration judge asserted that the documents were necessary in order for the Petitioner to receive favorable consideration of her application. As such, the determination of the Circuit Court that Petitioner failed to raise a sufficient constitutional claim or assert prejudice was plain error as the Petitioner was denied her right to due process in the administrative proceedings.

2. Proceedings Below-

The Petitioner is Christa Marie Labbe, born on November 13, 1963 in the nation of Haiti. The Petitioner entered the United States on or about April 13, 1986 as a lawful permanent resident. The Petitioner asserts that during his period of residence

in the United States she resided continuously in New York State. The Petitioner further asserts that she was placed into removal proceedings following a brief trip to Haiti to help a family member.

Pursuant to a notice to appear dated July 21, 2003, the Petitioner was placed into removal proceedings as the agency sought her removal pursuant to 8 U.S. C. section 1182(a)(2)(A)(i)(I). This charge was predicated upon the allegation that the Petitioner had been convicted on or about August 12, 1991, under NYPL 125.20, for manslaughter. The Petitioner admitted the allegations related to her alleged criminal offenses, as well as those relating to the charges of removal.

The immigration judge sustained the charges and allegations of removal, finding that the Respondent had met its burden of proof by clear and convincing evidence. The Petitioner then requested relief in the form of a waiver under
former INA section 212(c).

Prior to the conduct of the individual hearing, the immigration court prepared 3 subpoenas so as to permit the Petitioner to obtain medical and other evidence it required as support of her request for 212(c) relief. The subpoenas prepared by the court were defective, however, because they did not contain the Petitioner's date of birth or social security number. The subpoenas were returned to the court for correction and the Petitioner's counsel did not receive notice of the defects until three days prior to the final hearing in the case. The immigration court refused to reschedule the hearing date.

The Petitioner, and her aunt provided testimony

in support of Petitioner's application for relief from removal at individual hearings held on or about November 4, 2003, December 8, 2003 and January 15, 2004. The Petitioner and her witness provided testimony regarding her residence in the United States, including her family ties, her employment, her community involvement and service, as well as her criminal history in the United States. The Petitioner offered testimony regarding her manslaughter conviction. The Petitioner and her witness also provided testimony regarding these areas as well as the hardship to befall the family if the Petitioner was to be removed from the United States.

Notwithstanding the evidence and testimony presented by the Petitioner, the immigration judge denied the Petitioner's application for relief from removal asserting that not enough evidence regarding the Petitioner's assertion of rape, or the circumstances of her involvement in the manslaughter conviction had been presented to the court.

The Petitioner filed a timely appeal of the decision of the immigration judge, asserting that the findings of the immigration judge were an abuse of discretion and clearly erroneous as the evidence required by the court was not available due to the incorrect completion of the Petitioner's subpoenas by the court, that the court should have granted the Petitioner a continuance due to the court's error and that the failure to provide a continuance was an abuse of discretion.

On or about May 13. 2004, the Board of Immigration Appeals denied the Petitioner's appeal

finding that the Petitioner failed to present sufficient evidence to justify grant of her relief application. The Board offered no analysis of the adjudication of the relief application by the immigration judge, nor did it provide any adjudication of the Petitioner's assertion that the Petitioner was prejudiced by the fact that the defective subpoena prepared by the immigration court rendered it impossible for her to obtain the evidence the court required for favorable adjudication of her relief application. Petitioner's former counsel specifically stated that the Petitioner was prejudiced by the defective subpoena and by the refusal of the immigration court to permit Petitioner the opportunity to correct the defect and obtain the evidence in question.

Petitioner filed a petition for review with the US Court of Appeals for the Third Circuit challenging the dismissal of her appeal by the Board. The Petitioner asserted that the finding of the Board violated her right to due process of law and she asserted that she was prejudiced in the removal proceedings by the conduct of the immigration court.

The Court of Appeals, on or about September 21, 2007 dismissed the Petitioner's appeal finding that the Petitioner failed to present a valid constitutional issue or assert that she was prejudiced in the administrative proceedings. Further, on or about November 20, 2007, the Court of Appeals declined to grant the Petitioner's petition for rehearing.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred when it determined that the Petitioner failed to raise assert issues sufficient to support claim that her right to due process was violated and that she was prejudiced in the administrative proceedings. While it might have been correct that the Petitioner's motion for remand did not raise that claim adequately, it was without foundation ignoring the fact that the issues of due process and prejudice were asserted fully and clearly in the Petitioner's notice of appeal to the Board of Immigration Appeals.

An agency that fails to follow its own rules and regulations in the adjudication of a litigant's rights with respect to issues within its jurisdiction has denied the litigant a fundamentally fair hearing and has violated the due process rights of that individual. *Accardi v. Shaughnessy*, 347 US 260 (1954). Moreover, the Board of Immigration Appeals is charged with rendering decisions based upon the record developed by an immigration judge. *Abdulai v. Ashcroft*, 239 F.3d 542 (3rd Cir. 2001)

In the administrative proceedings, the immigration court prepared three subpoenas needed by the Petitioner to obtain evidence that the court required. Those subpoenas were defective in that they did not contain the Petitioner's date of birth or her social security number. The entities to whom the subpoenas were sent returned them to the court for correction of the defects. The immigration court only provided notice of the defect and rejection of the subpoenas

to the Petitioner's attorney three days prior to the scheduled individual hearing. The immigration judge then refused to reschedule the hearing to permit correction of the asserted defect and delivery of the required documents.

Due, in significant part to those errors, the information sought by the Petitioner was not obtained in a timely manner and the merits hearing was conducted without the requested documents. The immigration judge rejected the Petitioner's relief application, in substantial part, due to the fact that the evidence was not submitted to the court for consideration. The immigration judge stated: "...(T)his court...directed respondent's counsel to see about getting additional information that would help in the adjudication of this case...however, there is no evidence about the background of the conviction..." (AR 49) Though the immigration judge held the Petitioner to account for the lack of documentation, the immigration judge and the Board, ignored completely, the court's role in the set of circumstances that led to the Petitioner's inability to obtain the requested documents.

Though the Board asserted that the Petitioner presented no evidence that she could not obtain the documents sought by subpoena prior to the conclusion of the individual hearing, the evidence of the errors contained in the subpoenas prepared by the court were in fact known prior to the entry of a decision on the removal case by the immigration judge. Thus, the assertion by the Board was, contradicted by the record of proceeding.

The Petitioner's former attorney requested a subpoena to obtain the evidence requested by the immigration judge. (AR 287) The subpoenas were prepared by the immigration court and issued. (AR 288-294) The subpoenas prepared by the court were, however, defective, because they did not contain information regarding the Petitioner's birth date or social security number. (AR 2) The Petitioner's former counsel pointed out, the subpoena's were prepared by the court and he could not alter them and he only received notice that the subpoenas were defective three days prior to the individual hearing. (AR 28)

The Court of Appeals ignored these factual circumstances when it determined that the Petitioner did not raise a constitutional challenge or claim prejudice sufficient to permit it to assert jurisdiction to adjudicate the Petitioner's petition for review. With respect to the issue of prejudice, the error of the immigration court and the resulting delay in getting the evidence had a devastating impact on the Petitioner's ability to obtain the needed documents prior to the start of the individual hearing. This fact was noted by Petitioner's former counsel in the notice of appeal, yet the Circuit Board offered no explanation as to why this circumstance was insufficient to constitute prejudice and permit it to adjudicate the Petitioner's appeal.

The determination of the Court of Appeals was in contradiction to its own legal precedent as it has held that where Constitutional issues are raised, they are fully within the jurisdiction of this court. *Cruz v. Attorney General*, 452 F.3d 240 (3rd Cir. 2006)

Further, contrary to the assertions of the Circuit Court that the Petitioner did not establish the harm she sustained as the result of the Respondent's conduct to such a sufficient degree to rise to a constitutional violation, the act of the immigration court in preparing defective subpoenas which proved to be ineffective and the failure of the Respondent to correct its errors prior to determining that the Petitioner's evidence was insufficient was plain error on the part of the Circuit Court. Accordingly, its citation to *Khan v. Attorney General*, 448 F.3d 226 (3rd Cir. 2006) as justification for its denial of the Petitioner's appeal was misplaced.

Conclusion

The decision of the US Court of Appeals for the Third Circuit in asserting that it lacked jurisdiction to consider the Petitioner's appeal ignored the precedent set forth by this court in *INS v. St. Cyr* (supra), and its own precedent in *Cruz v. Attorney General* (supra), finding that notwithstanding the efforts of Congress to strip federal courts of jurisdiction to hear appeals of criminal aliens, federal courts retain jurisdiction to consider such appeals where constitutional claims are presented. The administrative record fully supported the Petitioner's assertion that the facts upon which her constitutional claims are based were fully presented to the Board of Immigration Appeals and yet they were ignored. Accordingly, the issues were fully ripe for adjudication by the Court of Appeals.

Review of this appeal by this court is essential as the decision of the Court of Appeals reveals confusion regarding the extent to which federal courts may exert jurisdiction over the appeals of criminal aliens and whether the Respondent's errors that affect the outcome of removal proceedings constitute sufficient grounds for an alien's assertion that such errors prejudice his right to due process of law in removal proceedings.

Sincerely,

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